SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-723

HOWARD J. MEISTER,

Petitioner,

vs.

LeROY L. DALTON,

Respondent.

No. 71-723

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I.

THIS COURT'S JURISDICTION TO GRANT THE WRIT

Petitioner bases his application for a writ of certiorari on 28 U.S.C. 1257 (3). Respondent respectfully submits that on the basis of this section the Court lacks jurisdiction to grant the writ since petitioner failed to raise his federal

claim in a timely fashion before the Wisconsin courts. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73 L. Ed. 184, 49 S. Ct. 61 (1928).

This Court has stated that in an application for review of a state court judgment, the petitioner carries the burden of showing affirmatively that the Court has jurisdiction. Gorman v. Washington University, 316 U.S. 98, 86 L. Ed. 1300, 62 S. Ct. 962 (1942), reh. denied, 316 U.S. 711. Since petitioner has completely neglected to demonstrate submission of his federal claim to the Wisconsin courts, we submit that he has failed to meet that burden. Moreover, by failing to specify the time and manner in which his constitutional claim was raised in the Wisconsin courts, petitioner's brief does not comply with the requirements of U.S. Sup. Ct. Rule 23 (f), 28 U.S.C.

In fact, petitioner's federal claim was not raised either before the trial court or in his appeal to the Wisconsin Supreme Court. Its first appearance came in his motion to the Wisconsin Supreme Court for rehearing. It is well established that a motion for rehearing is too late to raise a federal question so as to provide the basis for jurisdiction in this Court. Herndon v. Georgia, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794 (1935), Bilby v. Stewart, 246 U.S. 255, 62 L. Ed. 701, 38 S. Ct. 264 (1918). Additionally, the Wisconsin Supreme did not, on its own initiative, consider the constitutionality of punitive damages. The only discussion of that question appears in the single dissenting opinion. The majority clearly indicates that, while it was aware the issue potentially existed in the case, the court did not pass on the issue since it was not raised by the parties.

Nor should it be assumed that the Wisconsin court's affirmance represents an implicit determination of the merits of petitioner's claim. It is well established in Wisconsin that a party has no right to consideration on appeal of a question which under Wisconsin law, should have first been raised in the court below, either by objection to jury instructions, Shroeder v. Northern States Power Co., 46 Wis. 2d 637, 176 N.W. 2d 336 (1970), or by an objection to the amount of the verdict, Supervisors v. Lackawana Iron and Coal Co., 93 U.S. 619, 23 L. Ed. 989 (1876). There thus existed an adequate state ground which might have supported refusal of the Wisconsin court to pass upon petitioner's claim. As this Court stated in Williams v. Kaiser, 323 U.S. 471, 89 L. Ed. 398, 65 S. Ct. 363 (1945) at page 477:

> "Where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, this court will not undertake to review it."

II.

FAILURE OF THE PETITION TO RAISE A SUBSTANTIAL FEDERAL QUESTION

Assuming, arguendo, that this Court has jurisdiction to issue the writ, we submit that the writ should nevertheless be denied since in two recent cases this Court has already decided the constitutional issue in a manner unfavorable to the petitioner. In Curtis Publishing Co v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1049, 87 S. Ct. 1975 (1967), at page 160, the Court responded to the

substance of petitioner's claim in language particularly apposite to this case:

> "We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittur, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted."

While Curtis did not involve a libel action by a public official, the Court's opinion did recognize that nothing in its previous decisions suggested that compensatory and punitive damages are subject even to different constitutional standards of misconduct. 388 U. S. at page 160. Curtis strongly suggests that where, as here, it has been shown that the defendant acted with actual malice, there is no absolute constitutional bar to awarding punitive damages.

The several opinions rendered by members of this Court in Rosenbloom v. Metromedia, 403 U.S. 29, 29 L. Ed. 2d 296, 91 S. Ct. 1811 (1971) reflect divergent views as to the constitutional propriety of punitive damages in a state libel action. Nevertheless, as pointed out by Mr. Justice WHITE in his concurrence at page 36, a majority of this Court indicates that at most the constitution requires that punitive damages be strictly limited. The opinions of a majority of this Court conclude that the constitution presents no absolute bar to the imposition of punitive damages. Punitive damages should be allowed where, as here, it is clear that they were strictly limited

so as to closely reflect the compensatory damages and the degree of petitioner's culpability. Where the defendant acted out of actual malice, the decisions of this Court in Curtis and Rosenbloom indicate that the award of punitive damages is not constitutionally infirm.

III.

CONCLUSION

We submit the petitioner's application should be denied for the reason that he has failed on the one hand to discharge the burden of establishing jurisdiction of this Court, and on the other in failing to show that a substantial federal question is involved on the merits in the case below.

Respectfully submitted,

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